

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

JOSEPH M. LANGER, et al.,

Plaintiffs,

v.

**DEWOLFF, BOBERG &
ASSOCIATES, INC.,**

Defendant.

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Civil Action No. 3:10-cv-956-O

COURT'S CHARGE

MEMBERS OF THE JURY:

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you the jury are the judges of the facts. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case.

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

Answer the question from the facts as you find them. Do not decide who you think should win and then answer the question accordingly. Your answer and your verdict must be unanimous.

12 You must answer the question according to the preponderance of the evidence. By this is
13 meant the greater weight and degree of credible evidence before you. In other words, a
14 preponderance of the evidence just means the amount of evidence that persuades you that a claim
15 is more likely so than not so. In determining whether any fact has been proved by a preponderance
16 of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all
17 witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless
18 of who may have produced them.

19 In determining the weight to give to the testimony of a witness, you should ask yourself
20 whether there was evidence tending to prove that the witness testified falsely concerning some
21 important fact, or whether there was evidence that at some other time the witness said or did
22 something, or failed to say or do something, that was different from the testimony the witness gave
23 before you during the trial.

24 You should keep in mind, of course, that a simple mistake by a witness does not necessarily
25 mean that the witness was not telling the truth as he or she remembers it, because people may forget
26 some things or remember other things inaccurately. So, if a witness has made a misstatement, you
27 need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse
28 of memory; and the significance of that distinction may depend on whether the misstatement
29 concerns an important fact or only an unimportant detail.

30 While you should consider only the evidence in this case, you are permitted to draw such
31 reasonable inferences from the testimony and exhibits as you feel are justified in light of common
32 experience. In other words, you may make deductions and reach conclusions that reason and

33 common sense lead you to draw from the facts that have been established by the testimony and
34 evidence in the case.

35 The testimony of a single witness, if believed after considering all the other evidence, may
36 be sufficient to prove any fact, even if a greater number of witnesses may have testified to the
37 contrary.

38 There are two types of evidence that you may consider in properly finding the truth as to the
39 facts in the case. One is direct evidence—such as testimony of an eyewitness. The other is indirect
40 or circumstantial evidence—the proof of a chain of circumstances that indicates the existence or
41 nonexistence of certain other facts. As a general rule, the law makes no distinction between direct
42 and circumstantial evidence, but simply requires that you find the facts from a preponderance of all
43 the evidence, both direct and circumstantial.

44 This case arises under the Fair Labor Standards Act (“FLSA”), a federal law that provides
45 for the payment of time-and-a-half overtime pay to certain categories of employees. The Plaintiffs
46 claim that they were covered by the FLSA and that the Defendant DeWolff, Boberg & Associates,
47 Inc. (“DBA”) did not pay them the legally required overtime pay. DBA claims that the Plaintiffs
48 were exempt from the FLSA and consequently were not owed overtime pay. The exemption claimed
49 by DBA is the administrative exemption.

50 To establish that the Plaintiffs were exempt, DBA must prove by a preponderance of the
51 evidence the following essential elements of the administrative exemption:

- 52 1. That the Plaintiffs were compensated on a salary basis at a rate not less than \$455 per
53 week. The parties have stipulated, or agreed, to this first fact and you should
54 consider it as established.

55 2. That the Plaintiffs' primary duties were the performance of office or non-manual
56 work directly related to the management or general business operations of DBA or
57 DBA's customers; and

58 3. That the Plaintiffs' primary duties included the exercise of discretion and
59 independent judgment with respect to matters of significance.

60 The term "primary duty" means the principal, main, major, or most important duty that an
61 employee performs. Determination of an employee's primary duty must be based on all the facts in
62 a particular case, with the major emphasis on the character of the employee's job as a whole. Factors
63 to consider when determining the primary duty of an employee include, but are not limited to, the
64 relative importance of the exempt duties as compared with other types of duties; the amount of time
65 spent performing exempt work; the employee's relative freedom from direct supervision; and the
66 relationship between the employee's salary and the wages paid to other employees for the kind of
67 nonexempt work performed by the employee.

68 You will also have to determine whether the primary duty of DBA Staff Associates involves
69 work "directly related to the management or general business operations." This phrase refers to the
70 type of work performed by the employee. To meet this requirement, an employee must perform
71 work directly related to assisting with the running or servicing of the business, as distinguished, for
72 example, from working on a manufacturing production line or selling a product in a retail or service
73 establishment.

74 "Work directly related to management or general business operations" includes work in
75 functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control;
76 purchasing; procurement; advertising; marketing; research; safety and health; personnel

77 management; human resources; employee benefits; labor relations; public relations, government
78 relations; computer network, internet, and database administration; legal and regulatory compliance;
79 and similar activities.

80 An employee may qualify for the administrative exemption if the employee's primary duty
81 is the performance of work directly related to the management or general business operations of the
82 employer's customers. Thus, for example, employees acting as advisers or consultants to their
83 employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

84 I will now explain what is meant by the terms "exercising discretion and independent
85 judgment" and "with respect to matters of significance." In general, the exercise of discretion and
86 independent judgment involves the comparison and the evaluation of possible courses of conduct,
87 and acting or making a decision after the various possibilities have been considered. The term
88 "matters of significance" refers to the level of importance or consequence of the work performed.

89 Factors to consider when determining whether an employee exercises discretion and
90 independent judgment with respect to matters of significance include, but are not limited to: whether
91 the employee has authority to formulate, affect, interpret, or implement management policies or
92 operating practices; whether the employee carries out major assignments in conducting the
93 operations of the business; whether the employee performs work that affects business operations to
94 a substantial degree, even if the employee's assignments are related to operation of a particular
95 segment of the business; whether the employee has authority to commit the employer in matters that
96 have significant financial impact; whether the employee has authority to waive or deviate from
97 established policies and procedures without prior approval; whether the employee has authority to
98 negotiate and bind the company on significant matters; whether the employee provides consultation

99 or expert advice to management; whether the employee is involved in planning long-term or
100 short-term business objectives; whether the employee investigates and resolves matters of
101 significance on behalf of management; and whether the employee represents the company in
102 handling complaints, arbitrating disputes, or resolving grievances.

103 Other factors which have been found relevant in assessing whether an employee exercises
104 discretion and independent judgment include the employee's freedom from direct supervision,
105 personnel responsibilities, troubleshooting or problem-solving activities on behalf of management,
106 use of personalized communication techniques, authority to handle atypical or unusual situations,
107 authority to set budgets, responsibility for assessing customer needs, primary contact to public or
108 customers on behalf of the employer, the duty to anticipate competitive products or services and
109 distinguish them from competitors' products or services, advertising or promotion work, and
110 coordination of departments, requirements, or other activities for or on behalf of employer or
111 employer's clients or customers. Employees who meet at least two or three of these factors are
112 generally found to be exercising discretion and independent judgment, although a case-by-case
113 analysis is required.

114 The exercise of discretion and independent judgment implies that the employee has authority
115 to make an independent choice, free from immediate direction or supervision. However, employees
116 can exercise discretion and independent judgment even if their decisions or recommendations are
117 reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require
118 that the decisions made by an employee have a finality that goes with unlimited authority and a
119 complete absence of review. The decisions made as a result of the exercise of discretion and
120 independent judgment may consist of recommendations for action rather than the actual taking of

121 action. The fact that an employee's decision may be subject to review and that upon occasion the
122 decisions are revised or reversed after review does not mean that the employee is not exercising
123 discretion and independent judgment.

124 An employer's volume of business may make it necessary to employ a number of employees to
125 perform the same or similar work. The fact that many employees perform identical work or work of the
126 same relative importance does not mean that the work of each such employee does not involve the
127 exercise of discretion and independent judgment with respect to matters of significance.

128 The exercise of discretion and independent judgment must be more than the use of skill in
129 applying well-established techniques, procedures, or specific standards described in manuals or other
130 sources. The exercise of discretion and independent judgment also does not include clerical or
131 secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent, or
132 routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

133 An employee does not exercise discretion and independent judgment with respect to matters of
134 significance merely because the employer will experience financial losses if the employee fails to
135 perform the job properly. For example, a messenger who is entrusted with carrying large sums of money
136 does not exercise discretion and independent judgment with respect to matters of significance even
137 though serious consequences may flow from the employee's neglect. Similarly, an employee who
138 operates very expensive equipment does not exercise discretion and independent judgment with respect
139 to matters of significance merely because improper performance of the employee's duties may cause
140 serious financial loss to the employer.

141 Work that is "directly and closely related" to the performance of exempt work is also
142 considered exempt work. The phrase "directly and closely related" means tasks that are related to
143 exempt duties and that contribute to or facilitate performance of exempt work. Thus, "directly and

144 closely related” work may include physical tasks and menial tasks that arise out of exempt duties,
145 and the routine work without which the exempt employee’s exempt work cannot be performed
146 properly. Work “directly and closely related” to the performance of exempt duties may also include
147 recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create
148 documents or presentations; opening the mail for the purpose of reading it and making decisions;
149 and using a photocopier or fax machine. Work is not “directly and closely related” if the work is
150 remotely related or completely unrelated to exempt duties.

151 The following is an example that further illustrates the type of work that is normally
152 considered as directly and closely related to exempt work:

153 A business consultant may take extensive notes recording the flow of work and materials
154 through the office or plant of the client; after returning to the office of the employer, the consultant
155 may personally use the computer to type a report and create a proposed table of organization.
156 Standing alone, or separated from the primary duty, such note-taking and typing would be routine
157 in nature. However, because this work is necessary for analyzing the data and making
158 recommendations, the work is directly and closely related to exempt work. While it is possible to
159 assign note-taking and typing to nonexempt employees, and in fact it is frequently the practice to do
160 so, delegating such routine tasks is not required as a condition of exemption.

161 Included among the types of positions that may qualify for the administrative employee
162 exemption are management consultants who study the operations of a business and propose changes
163 in the organization, and employees who lead teams of other employees assigned to complete major
164 projects for the employer (such as purchasing, selling, or closing all or part of the business,
165 negotiating a real estate transaction or a collective bargaining agreement, or designing and

166 implementing productivity improvements), even if the employee does not have direct supervisory
167 responsibility over the other employees on the team.

168 The following positions have also been found to qualify for the administrative exemption:
169 human resources consultants; software consultants; training consultants; rehabilitation specialists
170 who advise clients; financial analysts; work planners who provide advice in plant operations; office
171 managers; event coordinators; shipyard production managers; marketing representatives; payroll
172 supervisors; table games supervisors; grant, funding and budget managers; software account
173 managers; and insurance claim adjusters.

174 The following are types of positions that typically do not qualify for the administrative
175 employee exemption: personnel clerks who screen applicants to obtain data regarding their minimum
176 qualifications and fitness for employment; ordinary inspection work; examiners or graders (such as
177 employees that grade lumber); comparison shopping performed by an employee of a retail store who
178 reports to the buyer the prices at the competitor's store; public sector inspectors or investigators such
179 as fire prevention or safety, building or construction, health or sanitation, environmental or soils
180 specialists; and similar employees.

181 In a general sense, a civil trial such as this has two issues: liability and damages. Prior to the
182 start of this trial, I issued a ruling that bifurcated this trial, that is, cut this trial into two parts. What
183 that means is that you have heard only the evidence that relates to liability, and you will decide that
184 issue. I will be instructing you only on the law that applies to the issue of liability at this time. You
185 must not speculate about the Plaintiffs' damages in deliberating the issue of liability.

186 It is your sworn duty as jurors to discuss the case with one another in an effort to reach
187 agreement if you can do so. Each of you must decide the case for yourself, but only after full

188 consideration of the evidence with the other members of the jury. While you are discussing the case,
189 do not hesitate to re-examine your own opinion and change your mind if you become convinced that
190 you are wrong. However, do not give up your honest beliefs solely because the others think
191 differently, or merely to finish the case.


192 Remember that in a very real way you are the judges—judges of the facts. Your only interest
193 is to seek the truth from the evidence in the case.

194 When you retire to the jury room to deliberate, you may take with you this charge and the
195 exhibits that the Court has admitted into evidence. Select your Foreperson and conduct your
196 deliberations. If you recess during your deliberations, follow all of the instructions that I have given
197 you concerning your conduct during the trial. After you have reached your unanimous verdict, your
198 Foreperson must fill in your answer to the written question and sign and date the verdict form.
199 Return this charge together with your written answer to the question. Unless I direct you otherwise,
200 do not reveal your answer until such time as you are discharged.

201 If you want to communicate with me at any time, please give a written message to the Court
202 Security Officer, who will bring it to me. I will then respond as promptly as possible, either in
203 writing or by meeting with you in the courtroom. Before I answer your question, I will always first
204 show the attorneys your question and my response.

205 After you have reached a verdict, you are not required to talk with anyone about the case
206 unless I order you to do so.

207 You may now retire to the jury room to conduct your deliberations.



REED O'Connor
Presiding Judge

Signed this 27th day of October, 2011.

Jury Verdict Form

1. Has DBA proved by a preponderance of the evidence each of the essential elements of its affirmative defense that the Plaintiffs are exempt from the Fair Labor Standards Act under the administrative exemption?

Yes ☒ No ☐

Once you have answered Question #1, your deliberations are complete. Please have your Foreperson sign and date the verdict sheet, and please provide the Court Security Officer with a note stating that you have reached a verdict. Thank you for your service.

Foreperson Signature: Gerald Farris

Foreperson Name (Please Print): GERALD FARRIS

Date: 27 October 2011